

No. _____

**UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF COMMERCE**

**Weaver's Cove Energy, LLC
Appellant,**

vs.

**Massachusetts Office of
Coastal Zone Management
Respondent.**

**REPLY BRIEF FOR APPEAL OF WEAVER'S COVE ENERGY, LLC
UNDER THE COASTAL ZONE MANAGEMENT ACT**

Bruce F. Kiely
G. Mark Cook
Jessica A. Fore
Emil J. Barth
BAKER BOTTS L.L.P.
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Appellant
Weaver's Cove Energy, LLC

November 26, 2007

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. Clarification of Facts	1
II. The Project Is Consistent With The Objectives Of The CZMA.....	3
A. Element 1: Weaver’s Cove Has Demonstrated That The Project Furthers The National Interest In A Significant And Substantial Manner	3
B. Element 2: Weaver’s Cove Has Established That The National Interest Furthered By The Project Outweighs Any Adverse Coastal Effects.....	6
C. Element 3: There Are No Reasonable Alternatives To The Project.....	14
III. The Project Is Necessary In The Interest Of National Security	15
CONCLUSION	15

TABLE OF AUTHORITIES

CASES

<i>Connecticut v. U.S. Dep't of Commerce</i> , No. 3:04cv1271, 2007 WL 2349894 (D. Conn. Aug. 15, 2007)	8, 10
--	-------

STATUTES

15 U.S.C. § 717b	2
16 U.S.C. § 1451	5
16 U.S.C. § 1452	5
16 U.S.C. § 1456	1, 2, 4

REGULATORY MATERIALS

15 C.F.R. § 930.120.....	2
15 C.F.R. § 930.121.....	2
15 C.F.R. § 930.122.....	2
15 C.F.R. § 930.127.....	8
15 C.F.R. § 930.130.....	4
30 C.F.R. § 250.224.....	3
33 C.F.R. Part 127	2
33 C.F.R. § 127.015.....	4
CZMA Federal Consistency Regulations, 71 Fed. Reg. 788, 822 (Jan. 5, 2006).....	6, 15
Navigational and Vessel Inspection Circular No. 05-05	4
301 Mass. Code Regs. 21.07	3

SECRETARY OF COMMERCE DECISIONS

<i>Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc. (Oct. 29, 1990)</i>	3
<i>Decision and Findings in the Consistency Appeal of Islander East Pipeline Company, L.L.C. (May 5, 2004)</i>	8, 14
<i>Decision and Findings in the Consistency Appeal of Long Island Lighting Co. (Feb. 26, 1988)</i>	3
<i>Decision and Findings in the Consistency Appeal of Millennium Pipeline Co. (Dec. 12, 2003)</i>	15
<i>Decision and Findings in the Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc. (Sept. 2, 1994)</i>	5
<i>Decision and Findings in the Consistency Appeal of Jessie W. Taylor (Dec. 28, 1998)</i>	4
<i>Decision and Findings in the Consistency Appeal of The Korea Drilling Company, Ltd. (Jan. 19, 1989)</i>	2
<i>Decision and Findings in the Consistency Appeal of Va. Elec. & Power Co. (May 19, 1994)</i>	15

ARGUMENT

I. Clarification of Facts

Weaver's Cove Energy, LLC ("Weaver's Cove") set forth the facts underlying this appeal in its Principal Brief ("WCE Br.") and seeks here only to correct certain inaccuracies in the brief of the Massachusetts Office of Coastal Zone Management ("MCZM"):

First, MCZM argues that Weaver's Cove is trying to improperly "bypass" federal consistency review or "jeopardize the integrity" of the Coastal Zone Management Act ("CZMA") by pursuing the appeal. MCZM Br. at 1, 10, 17-18. To the contrary, on January 10, 2007, MCZM found that Weaver's Cove had submitted the requisite materials to commence consistency review. *See* WCE Br. App. at A-7. Weaver's Cove has a statutory right to a consistency determination within six months of the commencement of consistency review, 16 U.S.C. § 1456(c)(3)(A), after which Weaver's Cove has a statutory right to appeal an objection to the Secretary of Commerce ("Secretary") for override. *Id.* While MCZM may disapprove of the statutory scheme of the CZMA, *see* MCZM Br. at 17-20, Weaver's Cove is not jeopardizing the integrity of the CZMA by pursuing its statutory rights.

Second, MCZM argues that Weaver's Cove requested a stay of the six-month review period and then refused to agree to one. MCZM Br. at 8. Weaver's Cove was initially receptive to a stay in order to secure the state permits that MCZM claimed were necessary for it to issue a concurrence. However, when the Massachusetts Department of Environmental Protection ("MADEP"), after advising Weaver's Cove and MCZM that the issuance of the permits was imminent, abruptly stopped processing state permits indefinitely, *see* WCE Br. App. at A-9, the reason for a stay evaporated.

Third, throughout its brief, MCZM improperly considers Weaver's Cove's proposed vessel transit activities to be before the Secretary in this appeal. *See, e.g.,* MCZM Br.

at 12, 13, 27-28. The only activities under review in this appeal are those federally-permitted activities proposed by Weaver's Cove that triggered consistency review and were objected to by MCZM — the dredge and fill activities permitted by the U.S. Army Corps of Engineers ("USACE") being undertaken in conjunction with the siting, construction and operation of LNG terminal facilities authorized by the Federal Energy Regulatory Commission ("FERC") (the "Project").¹ This is underscored by the scope of review set forth by both the CZMA regulatory scheme and the Secretary's prior decisions. *See, e.g.*, 16 U.S.C. § 1456(c)(3)(A) (Secretary reviews federally permitted activity objected to by the state); 15 C.F.R. §§ 930.120-122 (same); *Decision and Findings in the Consistency Appeal of The Korea Drilling Co. Ltd.* (Jan. 19, 1989), at 4-5 ("The activity that the [federal] agency is authorized to license or permit [after override] is the one that the [state] reviewed for consistency.").

While Weaver's Cove is seeking a Letter of Recommendation ("LOR") from the U.S. Coast Guard ("USCG") for a vessel transit plan for LNG tankers that will deliver LNG to the terminal, this is a separately permitted activity from the permitted activities on appeal here.² *See, e.g.*, 33 C.F.R. Part 127. *See also* FEIS at 1-13 (recognizing that Weaver's Cove must obtain USCG approval). The vessel transit activities under review by the USCG were *not* before

¹ *See* Letter from MCZM to Weaver's Cove (July 6, 2007) (WCE Br. App. at A-2) ("MCZM Objection") (objecting to activities related to FERC authorization and USACE permits only). Ironically, by earlier letter, MCZM stated that "since Federal Energy Regulatory Commission authorization is not a Listed Activity, we will not perform a review of that action." Letter from MCZM to Weaver's Cove (Apr. 24, 2006) (Attached in the Weaver's Cove Supplemental Appendix at WCE SA-1).

² Notably, FERC only discusses vessel transit issues in its authorization for the Project pursuant to its role as the lead National Environmental Policy Act agency, *see Weaver's Cove Energy, LLC*, 112 FERC ¶ 61,070 at P 9 (2005) ("Approval Order") (WCE Br. App. at A-3); the USCG, not FERC, approves a vessel transit plan for tankers that will deliver LNG to the proposed terminal. *See* 15 U.S.C. § 717b(e)(1); Final Environmental Impact Statement ("FEIS") at 1-12 to 1-13 (WCE Br. App. at A-5) (describing USCG's role).

MCZM because an LOR is not a listed activity, *see* 301 Mass. Code Regs. 21.07 (listing activities subject to Massachusetts federal consistency review), and MCZM did not seek National Oceanic and Atmospheric Administration (“NOAA”) approval to review it as an unlisted activity. *See* MCZM Objection (objecting to FERC- and USACE- permitted activities only). Therefore, because the Secretary’s review is limited to those federally-permitted activities objected to by the state, vessel transit activities are not under review in this appeal.³ *See Decision and Findings in the Consistency Appeal of Long Island Lighting Co.* (Feb. 26, 1988), at 10 (stating that “[t]he CZMA consistency review net is simply not broad enough to encompass a related project when that project is not separately subject to consistency review”).

II. The Project Is Consistent With The Objectives Of The CZMA

For purposes of demonstrating that the Project is consistent with the objectives of the CZMA, Weaver’s Cove established in its Principal Brief that (1) the Project promotes the national interest in a significant and substantial manner (“Element 1”); (2) the national interest promoted by the Project outweighs any adverse coastal effects (“Element 2”); and (3) MCZM has not proposed an alternative to the Project consistent with the state’s coastal zone management program (“Element 3”). MCZM has marshaled no evidence to the contrary.

A. Element 1: Weaver’s Cove Has Demonstrated That The Project Furthers The National Interest In A Significant And Substantial Manner

MCZM does not contest Weaver’s Cove’s demonstration, based on a preponderance of the evidence, of how the Project furthers the national interest in a significant and substantial manner, *see* WCE Br. at 7-14. Instead, MCZM only argues that the Project may

³ *Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc.* (Oct. 29, 1990) (“*Chevron*”) is consistent with this analysis. In *Chevron*, the Secretary reviewed vessel traffic because, unlike the instant appeal, vessel transits *were* a part of the federally-permitted activity, *i.e.*, the Plan of Exploration (“POE”), that was objected to by the state and on appeal to the Secretary. *Id.* at 38-40. *See also* 30 C.F.R. § 250.224 (vessel activity as part of a POE).

not become “operational” because of a preliminary determination by the USCG as to a specific LNG vessel transit plan currently proposed by Weaver’s Cove, which, in MCZM’s estimation, diminishes the Project’s furtherance of the national interest.⁴ *See* MCZM Br. at 12. MCZM’s analysis is wrong.

1. The Secretary May Issue A Decision On The Merits In This Appeal Regardless Of Ongoing Review By Other Agencies

MCZM misapprehends the nature of the instant appeal. The Secretary’s review is not a final sign-off on the Project after all other approvals, including that of the USCG, have been issued, such that the Secretary is reviewing a project that can be “operational” if the Secretary overrides the state’s objection. This is apparent from the CZMA statutory scheme, which contemplates that the Secretary’s decision will precede those of other permitting agencies, *see, e.g.*, 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.130(e)(1), and from the Secretary’s precedents, *see, e.g., Decision and Findings in the Consistency Appeal of Jessie W. Taylor* (Dec. 28, 1998), at 17 (because of the Secretary’s override, “the [USACE] may issue the permit for the activity.”). Accordingly, the Secretary is fully empowered to make a decision in the instant appeal by analyzing the benefits and impacts the Project would have once constructed and operating as proposed, regardless of ongoing review by other permitting agencies. Therefore, MCZM’s assertion that the preliminary USCG determination should preclude an override by the Secretary in this appeal is at odds with how the CZMA appeals process works.

⁴ The preliminary determination by the USCG to which MCZM refers, *see* May 9, 2007 USCG Letter (MCZM SA-14), is just that — a preliminary determination. Approval of a vessel transit plan for Weaver’s Cove is an ongoing process that has involved and may continue to involve revisions to Weaver’s Cove’s proposed navigation plan, as well as further levels of review by the USCG. This is evident not only from the USCG’s regulations, *see, e.g.*, 33 C.F.R. § 127.015; Navigational and Vessel Inspection Circular No. 05-05 at 12, but also from the fact that Weaver’s Cove has previously modified its initial transit proposal. *See* Change of Information Letter (WCE SA-2); March 13, 2006 USCG Letter (MCZM SA-11). Weaver’s Cove will continue to work with the USCG to obtain its approval for the specific plan reviewed in the preliminary determination, or for another revised plan, as appropriate.

2. The Secretary's Decision In *Mobil Southeast* Does Not Undermine Weaver's Cove's Element 1 Analysis

MCZM's reliance on *Decision and Findings in the Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc.* (Sept. 2, 1994) ("*Mobil Southeast*") is misplaced. That decision does not support MCZM's argument that the extent to which the Project will further the national interest is diminished due to the preliminary USCG determination. MCZM Br. at 13. *Mobil Southeast* considered whether an oil exploration project would yield any benefits once constructed and operating due to *physical, geological* factors. *Mobil Southeast* at 40. In contrast, the likelihood of whether the USCG ultimately approves a vessel transit plan for Weaver's Cove is not the type of probability that could diminish the Project's furtherance of the national interest under *Mobil Southeast* because it is a *regulatory approval*, not a physical factor outside of the applicant's control. If MCZM's interpretation of *Mobil Southeast* were to prevail on this point, no federally-permitted activity could be approved by the Secretary because every project requiring multiple permits faces the possibility that its permits could be denied, amended or withdrawn, or that the governing law could change.

This appeal also differs from *Mobil Southeast* because the Project's energy benefits are not speculative as they were for the proposal in *Mobil Southeast*. Weaver's Cove will import LNG, rather than engage in exploration entailing geological uncertainties. For this reason, unlike the proposal in *Mobil Southeast*, the Project will not result in any adverse coastal impacts without also having substantial and significant benefits that will outweigh such impacts.

3. Safety Concerns About The Project Do Not Undermine Weaver's Cove's Element 1 Analysis

MCZM argues that because "others have voiced serious concerns about the Project's untenable unsafeness," the Project does not satisfy Element 1. MCZM Br. at 13. These "concerns" are not relevant because safety is not part of Element 1 review. *See, e.g.*, 16 U.S.C.

§§ 1451-1452 (safety issues not part of national interest for Element 1). Nevertheless, each of the concerns raised in the sources cited by MCZM has been fully addressed in the consolidated record (“Record”), *see, e.g.*, Approval Order at PP 80-99; FEIS at 4-230 to 4-296; Response of Weaver’s Cove, *et al.*, to Filing by Mass. Atty. Gen., *et al.* (filed before FERC June 17, 2005) (WCE SA-3), and have been determined not to affect the conclusion that “if the project is constructed and operated in accordance with the conditions attached to [FERC’s] approval, the Weaver’s Cove project will be safe.” Approval Order at P 32.

B. Element 2: Weaver’s Cove Has Established That The National Interest Furthered By The Project Outweighs Any Adverse Coastal Effects

1. The Secretary Has Sufficient Information To Make An Override Determination

MCZM contends that since the state objected to Weaver’s Cove’s consistency certification on the basis of insufficient information, there is also insufficient information for the Secretary to override MCZM’s objection. MCZM Br. at 1, 21. MCZM is wrong. The only “information” that is lacking is the issuance of certain state permits by other agencies. *See* MCZM Br. at 18. These state agencies have sufficient information to act on these permits, but just have not done so. *See* Certificate on the Supplemental Final Environmental Impact Report (Jul. 28, 2006) (WCE SA-4) (finding that “the state permitting agencies have *adequate information* on which to . . . *issue necessary permits for the project*” (emphasis added)). The failure of state agencies to act does not preclude the Secretary from making an override determination on the Record pursuant to his *de novo* review. CZMA Federal Consistency Regulations, 71 Fed. Reg. 788, 822 (Jan. 5, 2006) (“Final Rule 2006”).

MCZM also argues that without the issuance of state permits, the extent of adverse effects cannot be determined because these state permits may impose conditions or mitigation measures. MCZM Br. at 15-17. However, as Weaver’s Cove demonstrated, WCE Br.

at 16-24, mitigation measures that have been imposed on the Project — by FERC and, to the extent it has acted, by the state — and those that have been separately committed to by Weaver’s Cove, already will mitigate adverse effects such that these effects will be minimal or non-existent, and thus outweighed by the national interest. Any *additional* mitigation measures or conditions that the state might impose may *further* reduce any remaining adverse coastal effects, but would not alter the conclusion that the national interest outweighs any such effects.

Similarly, MCZM argues that the Secretary cannot make a decision on this appeal because of an alleged concern with applying a “mixing zone” to meet water quality standards will not be resolved until the state issues a water quality certification.⁵ MCZM Br. at 15. Yet, MCZM does not dispute that there is enough information in the Record for the Secretary to evaluate dredging and water quality impacts of the Project. *See, e.g.*, Section II.B.3 *infra*; Section 401 Water Quality Cert. Appl. for Dredging (“Dredging WQC Appl.”) (updated Nov. 2006), Att. A § 5.2 and Atts. D, K & L (WCE SA-5); Federal Consistency Certification (Jan. 4, 2007) (“Consist. Cert.”), App. B (WCE Br. App. at A-1). Because the Secretary reviews the issues in this appeal *de novo*, whether state agencies have acted on this information within the six month timeframe for consistency review is irrelevant.

2. The Record Evidence Demonstrates With Sufficient Definiteness That Potential Adverse Effects Are Minimal, Temporary And Mitigatable

The Record demonstrates that the Project’s adverse impacts would be minimal and temporary, either standing alone and/or after the institution of mitigation measures. WCE Br. at 16-26. As a result, any adverse effects are clearly outweighed by the national interest. Nowhere does MCZM substantively challenge this evidence or the conclusions in Weaver’s

⁵ Concerns regarding the applicability of a “mixing zone” for this Project are unfounded. MADEP has an established Mixing Zone Policy, Massachusetts Surface Water Quality Standards, Implementation Policy for Mixing Zones (MADEP, 1993) that applies to dredging activities.

Cove's Principal Brief. Instead, MCZM merely takes issue with certain language used in Weaver's Cove *brief*, arguing that this language (e.g. "majority", "primarily", "would be expected") means that the Project's impacts are too indefinite for the Secretary to reach a decision. MCZM Br. at 21-23. MCZM is superficially comparing language in the brief to language used in a conclusion in *Decision and Findings in the Consistency Appeal of Islander East Pipeline Co., LLC* (May 5, 2004) ("*Islander East*"), which conclusion was found invalid in *Connecticut v. U.S. Dep't of Commerce* because it "said nothing definitive about the duration of the adverse coastal effects caused by anchor scars," 2007 WL 2349894, at *12. In other words, the *Connecticut* court found that the underlying record did not support the conclusion drawn in *Islander East*. This case, however, has a very different, more comprehensive underlying record than *Islander East*, and MCZM's attempt to draw Mill River's conclusions into question based upon word play is unavailing.

Foremost, MCZM does not recognize that the brief itself is not a technical report; it provides a summary of the *scientific evidence and data in the record* supporting the conclusion that the adverse effects of the Project do not outweigh the national interest. The Record supporting the statements in Weaver's Cove's Principal Brief demonstrates that adverse effects have been closely examined and determined with a sufficient level of definiteness. Below is a matrix identifying the data and evidence in the Record, including the FEIS which separately identifies its own supporting studies and data, that corresponds to the statements made in Weaver's Cove's Principal Brief that MCZM claims are "tautological and meaningless," MCZM Br. at 21-22. This evidence and data demonstrates, with *quantification* and *definiteness*, that any adverse effects are minimal and temporary or will be mitigated to that level:

Brief Quote	FEIS Cite	Supporting Data
Suspended sediment modeling conducted by Weaver's Cove indicates that these time of year dredging restrictions, in combination with mitigative measures, to be undertaken by Weaver's Cove would "eliminate the majority of indirect winter flounder impacts associated with dredging." (WCE Br. at 18)	FEIS at 4-100 to 4-107	Consist. Cert, App. B (§§ 5.2, 6.0, 7.3) & F; Dredging WQC Appl., Att. D; Ch. 91 Resp., DMF07.02, .04, .06; FEIR, App. 8-6.
The FEIS concluded that this modeling suggests "that suspended sediments and increased turbidity associated with dredging would be a short-term effect limited primarily to the time periods and areas when and where dredging would be conducted." (WCE Br. at 19)	FEIS at 4-69 to 4-71	Dredging WQC Appl., Att. D; FEIR, App. 8-1; SFEIR § 4.2 & App. 4-2.
Sediment concentrations would be expected to return to background levels within about 1,600 to 2,300 feet of dredging operations. (WCE Br. at 19)	FEIS at 4-70	Dredging WQC Appl., Att. D; FEIR, App. 8-1; SFEIR § 4.2 & App. 4-2.

MCZM also takes issue with the wording of the FEIS conclusion that the potential impact from any elevated concentrations of dissolved contaminants resulting from dredging activities "would be expected to return to background levels within about 600 feet of the dredging operation," MCZM Br. at 22. However, Weaver's Cove did not depend on this conclusion to demonstrate that contaminants released by dredging activity will not result in adverse effects. In its Principal Brief, Weaver's Cove cites studies conducted *after* the issuance of the FEIS, which demonstrate that copper and zinc (the only contaminants at issue) will not be released at levels exceeding water quality standards, and only included the "600 feet" conclusion to convey the history of the analyses undertaken. *See* WCE Br. at 20. It is also perplexing why MCZM baselessly asserts that these studies are not relevant, MCZM Br. at 22, n.14, since they demonstrate that there will be no adverse impacts from contaminants resulting from dredging.

Equally unavailing is MCZM's suggestion that the "logic" of *Connecticut v. Department of Commerce* is applicable to the conclusions advanced by Weaver's Cove in the instant proceeding. The *Connecticut* conclusion from which MCZM derives this "logic" dealt

with consideration of only *minimum* adverse effects (*e.g.*, recovery of shellfish beds would take “*at least* 3 to 5 years”) which provided “just a floor, not a ceiling” on adverse effects. 2007 WL 2349894, at *12. In that case, the court held that reliance on the floor did not support the conclusion that adverse effects associated with the Islander East project would be temporary. In the instant case, Weaver’s Cove has provided data and evidence on both the *extent* and *duration* of impacts which demonstrate that such impacts are minimal and temporary. *See, e.g.*, Section II.B.3, *infra* (citing, for example, FEIS at 4-122: “[A] *maximum* of about 11 acres . . . would be permanently lost.” (emphasis added)). In fact, MCZM fails to identify where Weaver’s Cove has relied only on a “floor” for purposes of quantifying adverse effects. There is sufficient quantification of adverse effects to establish that the national interest promoted by the Project outweighs any such adverse effects.

3. The Record Contains Definite Evidence Demonstrating That Impacts From Dredging Are Minimal, Temporary Or Can Be Mitigated

MCZM argues that Weaver’s Cove’s dredging mitigation proposal leaves “many significant concerns . . . open and unresolved.” MCZM Br. at 24. MCZM is wrong. MCZM fails to confront the evidence in the Record on dredging, as is evident from the fact that its brief is bereft of any mention of scientific evidence that contradicts Weaver’s Cove’s analysis. Instead, MCZM relies on agency comments made several years ago that have been fully addressed by Weaver’s Cove throughout the Record. The evidence in the Record demonstrates that impacts from dredging will be temporary or limited, in part because of measures Weaver’s Cove has adopted to minimize and mitigate impacts. WCE Br. at 16-22.

Winter Flounder Spawning and Juvenile Development

Weaver’s Cove has committed to a *complete ban* on dredging between January 15 and May 31 — the winter flounder spawning period — so that there will be *no* impacts from

dredging during this time. Approval Order, App. B. MCZM's claim that Weaver's Cove fails to address concerns raised by NOAA's National Marine Fisheries Service ("NMFS") (MCZM Br. at 23) is incorrect: Weaver's Cove's time-of-year restriction is the same as NMFS's recommendation to protect winter flounder spawning and juvenile development.⁶ NMFS Letter to USACE, at 1 (Dec. 27, 2005) ("NMFS Letter") (MCZM SA-10).

Anadromous Fish Migration

Weaver's Cove has committed to a series of dredge equipment restrictions, operating restrictions and sequencing/spacing limitations to minimize the impacts of dredging on aquatic species. *See* Supplemental Final Environmental Impact Report ("SFEIR"), Ex. 1-1 and §§ 1.0, & 4.2.2.2 (WCE Br. App. at A-13); Table 1-2, TOY-2; Consist. Cert., App. G, USACE - Responses to Comment Letters (May 17, 2006), Att. A ("Pub. Int. Factors") § 5.1.8 (Pub. Int. Factors excerpted at WCE SA-7). Given these commitments, the record evidence establishes that sediment concentrations in the water column resulting from dredging would be below minimum threshold concentrations that would result in sub-lethal or lethal effects on fish, shellfish or any other marine organisms living in or migrating through the project area. *See* WCE Br. at 19. *See also* Table 1-2, TOY-1; Pub. Int. Factors §§ 4.0, 5.1.7, 5.1.8 & 5.1.9.

Instead of confronting this evidence, MCZM alleges that Weaver's Cove fails to address NMFS's concerns regarding fish migration. MCZM Br. at 23. Again, this allegation is refuted by the Record, which demonstrates that Weaver's Cove is either required to adopt or has committed to mitigation measures and dredging restrictions that are responsive to each concern

⁶ While NMFS questioned modeling inputs for determining impacts on winter flounder spawning, NMFS Letter at 2, Weaver's Cove's observance of the January 15 to May 31 dredging restriction renders this debate on the modeling academic. *But see* Consist. Cert., App. G, USACE - Responses to Comment Letters (May 17, 2006), Att. B, Table 1-2 ("Table 1-2"), WF-1 & WF-2 (WCE Br. App. at A-1) (Table 1-2 excerpted at WCE SA-6).

raised in the NMFS Letter.⁷ In other words, while MCZM relies on a comment letter that is nearly two years old, Weaver's Cove has fully addressed NMFS's concerns in the interim.

First, NMFS maintains that "a time of year dredging restriction between March 1 and July 31 should be required for anadromous fishery resources." NMFS Letter at 3. As explained above, the record evidence demonstrates that there will be no adverse impact to any migrating anadromous fish from suspended sediments. Nevertheless, consistent with NMFS's recommendation, Weaver's Cove voluntarily committed to abide by time of year dredging restrictions between March 1 and July 31 to render this issue moot.⁸ See SFEIR § 4.0.

Second, as to downstream migrations, NMFS recommends that "[a]lternatives that avoid and minimize adverse effects on downstream migrations of fish, including project sequencing and restrictions on the number of dredges operating between July 31 . . . and October 31, *should be analyzed*". NMFS Letter at 3-4 (emphasis added). As discussed above, Weaver's Cove has analyzed *and adopted* dredge equipment restrictions, operations restrictions and sequencing/spacing limitations which are responsive to NMFS's concerns. See Table 1-2, TOY-2; Pub. Int. Factors § 5.1.8. And, as discussed above, as a result of these measures, sediment concentrations in the water column resulting from dredging will not exceed the threshold concentrations that would result in sub-lethal or lethal effects on fish, shellfish or any other marine organisms living in or migrating through the project area. See WCE Br. at 19.

⁷ In addition to concerns regarding impacts on anadromous fish, which are addressed here, and winter flounder spawning, which is discussed above, NMFS also states in its letter that there will be a "permanent loss of 1.11 acres of aquatic habitat" at the terminal site that should be mitigated. NMFS Letter at 4. Subsequent to the issuance of that letter, Weaver's Cove revised the terminal site layout to reduce this loss of habitat to 0.56 acres. See Table 1-2, GUIDE -2, ¶ 3-4. Further, Weaver's Cove will mitigate this minimized loss. See WCE Br. at 22-23.

⁸ MCZM contends that Weaver's Cove has not formally committed to a dredge restriction extending to July 31. As the MEPA submission cited above demonstrates, MCZM is wrong.

MCZM also notes that the Massachusetts Division of Marine Fisheries (“DMF”) made similar comments in a July 20, 2006 letter regarding the Project’s dredging activities (“DMF Letter”) (MCZM SA-13).⁹ MCZM Br. at 24 (citing DMF Letter at 2). These concerns are also fully addressed by the Record as evidenced by the restriction on dredging from January 15 to July 31. DMF also raises concerns about the need for measures to protect “fish species not in low abundance” such as blueback herring. *See id.* These concerns were also raised by NMFS, *see* NMFS Letter at 2-3, and as discussed above, they have been addressed by the expansion of the dredging restriction to July 31 and the commitments regarding “dredge equipment restrictions, operating restrictions and sequencing/spacing limitations.” *See* Table 1-2, TOY-2; Pub. Int. Factors § 5.1.8. *See also* WCE Br. at 17.

Fisheries Habitat

Dredging of the turning basin expansion will increase water depth in 11 acres to a level that is too deep to support winter flounder spawning. *See* FEIS at 4-122 (“[A] *maximum* of about 11 acres . . . would be permanently lost.”) (emphasis added). Weaver’s Cove has committed to offsetting the loss of this 11 acres of winter flounder habitat. *See* WCE Br. at 21. The effectiveness of such mitigation measures is established in the Record. *See* Dredging WQC

⁹ MCZM further notes that DMF has expressed concern that “there are insufficient data to support the estimates from modeling efforts of the range and magnitude of negative impacts to marine species.” MCZM Br. at 24. Weaver’s Cove has repeatedly provided the information requested by DMF, which DMF has not challenged on a scientific basis. *See* Response to Comments on Federal Consistency Certifications, Att. C, Responses to Comments on Ch. 91 Licenses and Permit Appl. (“Ch. 91 Resp.”) (Mar. 2, 2007), DMF07.02 (WCE Br. App. at A-14).

The DMF Letter raises other issues not discussed in MCZM’s brief, which are fully addressed by information in the Record. *See, e.g.,* Table 1-2, D-19; *See* Response to Comments on Federal Consistency Certifications, Att. C, Responses to Comments on Section 401 Water Quality Cert. Appl. (Mar. 2, 2007), DMF.01-DMF.11 (WCE Br. App. at A-14); Ch. 91 Resp., DMF04.01–DMF04.09 & DMF07.01-DMF07.11.

Appl., Att. A § 4.2.1; SFEIR, Ex. 1-1 and §§ 1.3 & 5.0; Final Environmental Impact Report (“FEIR”) § 14.0 (WCE SA-8); Consist. Cert., App. B, § 7.3.

As to impacts on shellfish habitat, MCZM’s reliance on DMF’s claim that the “magnitude of likely impacts to shellfish beds are unknown so that a proper evaluation of compensatory mitigation is premature,” MCZM Br. at 24, is without merit.¹⁰ Impacts to shellfish habitat will result from removal of the bottom sediments containing quahogs in the dredge footprint. While approximately 21 acres of quahog habitat may be directly affected by dredging, Weaver’s Cove has agreed to a mitigation program for the *entire* 200 acre dredge footprint, which encompasses approximately 84 acres of mapped areas that the DMF has identified as potential habitat for quahog. *See* Table 1-2, MIT-6; FEIR, Apps. 3-2 & 8-3. Prior to dredging, quahogs will be harvested and moved (*i.e.* relayed) from the proposed dredging footprint to an appropriate site where they can be subsequently harvested for beneficial use after depuration. Table 1-2, SF-2; FEIR, Apps. 3-2 & 8-3. Those areas where quahogs were harvested prior to the start of dredging operations will be reseeded and then monitored to confirm successful replacement. Table 1-2, MIT-1; Ch. 91 Resp., DMF07.11; FEIR, Apps. 3-2 & 8-3. The proposed relay and seeding measures will be appropriately compensatory. *See* FEIR, App. 8-3.

C. Element 3: There Are No Reasonable Alternatives To The Project

MCZM misapprehends Element 3. MCZM “bears the burden of identifying, with sufficient specificity, an alternative that is consistent with its coastal management program.” *Islander East* at 35. If MCZM “meets that burden, the burden then shifts to [the project proponent] to show that the alternative is either unavailable or unreasonable.” *Islander East* at 35. Here, MCZM has completely failed to identify any alternative that is consistent with its

¹⁰ The claim made by DMF was both vague and unsubstantiated as DMF never explained exactly what was unknown. Not surprisingly, MCZM has not elaborated on this claim in its brief.

coastal management program. As NOAA has explained, “[i]f a State cannot make a finding of consistency for an alternative on appeal, then the State would not prevail on [] element [3].” Final Rule 2006 at 820. *See also Decision and Findings in the Consistency Appeal of Va. Elec. & Power Co.* (May 19, 1994), at 38. Because MCZM has not identified an alternative that is consistent with its coastal management program, MCZM cannot prevail on Element 3.

MCZM’s future consideration of other projects is inapposite. MCZM Br. at 25. These are not “alternatives” under NOAA’s regulations: “As contemplated by NOAA’s regulations, an alternative consists of one or more changes to the project that would allow the project, albeit in a somewhat different form, to achieve its primary purpose in a manner consistent with the state’s coastal management program.” *Decision and Findings in the Consistency Appeal of Millennium Pipeline Co.* (Dec. 12, 2003), at 21. Unrelated projects have nothing to do with whether Weaver’s Cove’s proposed activity, with one or more changes, can be conducted in a manner consistent with MCZM’s coastal management program.

III. The Project Is Necessary In The Interest Of National Security

MCZM’s reply to Weaver’s Cove’s national security analysis, WCE Br. at 27-29, merely discusses activities at issue in the LOR process before the USCG, which, as explained above, are not under review in this appeal.¹¹ MCZM Br. at 25-30. Moreover, MCZM’s contention that these separate activities not under review cause the Project that is under review to “impair national security,” *id.* at 28, is not supported by the Record.

CONCLUSION

For the foregoing reasons and those stated in its Principal Brief, Weaver’s Cove respectfully requests that the Secretary override the MCZM Objection.

¹¹ Further, neither the preliminary assessment, nor the USCG Commandant’s speech and USCG report that MCZM cites, MCZM Br. at 27-30, offers any assessment about whether the Project under review here meets the national security ground.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "B.F. Kiely", written over a horizontal line.

Bruce F. Kiely

G. Mark Cook

Jessica A. Fore

Emil J. Barth

BAKER BOTTS L.L.P.

The Warner

1299 Pennsylvania Avenue, N.W.

Washington, D.C. 20004-2400

(202) 639-7711

Counsel for

Weaver's Cove Energy, LLC

Dated: November 26, 2007

CERTIFICATE OF MAILING

Consistent with 15 C.F.R. § 930.127, copies of this brief and supporting materials have been sent to the following:

Mr. Joel La Bissonniere
Asst. General Counsel for Ocean Services
NOAA
1305 East-West Highway
SSMC-4, Room 6111
Silver Spring, MD 20910

Ms. Kimberly Bose
Federal Energy Regulatory Commission
888 1st Street N.E.
Washington, D.C. 20426

Ms. Carol Iancu
Assistant Attorney General, Environmental
Protection Division
Massachusetts Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108

Karen Kirk Adams
Chief, Regulatory Branch, U.S. Army Corps of
Engineers
696 Virginia Rd.
Concord, MA 01742-2751

Mr. Bruce Carlisle
Acting Director
Massachusetts Office of Coastal Zone
Management
251 Causeway Street, Suite 800
Boston, MA 02114-2136

Respectfully submitted:



Jessica Fore
BAKER BOTTS L.L.P.
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400
(202) 639-7727

Counsel for
Weaver's Cove Energy, LLC

Dated: November 26, 2007